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September 9, 1999

Ex Parte Presentation

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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RE: In the Matter of Applications for Consent to the Transfer of
Control of Licenses and Section 214 Authorizations from
Ameritech Corporation, Transferor, to SBC Communications Inc.,
Transferee, CC Dkt. No. 98-141

Dear Ms. Salas:

Attached is a letter that was sent from Michael Kellogg, counsel for SBC Communications, to Christopher J. Wright, FCC General Counsel. This letter demonstrates that under the proposed merger conditions, the SBC/Ameritech Advanced Services affiliate would not be a "successor" or "assign" of an SBC/Ameritech incumbent local exchange company within the meaning of section 251(h)(1)(B)(ii) or established case law.

Please contact me if you have any questions about this matter.

Yours sincerely,

Paul K. Mancini
General Attorney and
Assistant General Counsel
SBC Communications Inc.

cc:	Mr. Atkinson	Ms. Attwood
	Mr. Krattenmaker	Mr. Bailey
	Mr. Wright	Mr. Dixon
	Ms. Carey	Ms. Kinney
	Mr. Dever	Ms. Whitesell
	Ms. Mikes	Ms. Brown

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List ABCDE

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

STEVEN F. BENZ
NEIL M. GORSUCH
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Christopher J. Wright, Esquire
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8C-723
Washington, D.C. 20554

RE: *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, CC Dkt. No. 98-141*

Dear Chris:

Under the currently proposed conditions governing the transfer of control of licenses and section 214 authorizations from Ameritech to SBC Communications Inc., the combined SBC/Ameritech would be required, for three and one-half years, to provide Advanced Services through a separate affiliate. This condition will promote the deployment of Advanced Services, by ensuring both that CLECs have a full and equitable opportunity to provide such services and that SBC/Ameritech is not precluded from doing so in an efficient, nondiscriminatory manner.

Questions have been raised as to whether a separate Advanced Services affiliate might, under certain circumstances, be considered a "successor" or "assign" of the incumbent local exchange carrier ("ILEC"), within the meaning of 47 U.S.C. §§ 251(h)(1)(B)(ii) and 153(4)(b). I am writing this letter to explain why, under the conditions currently proposed, the SBC/Ameritech separate Advanced Services affiliate would not be a "successor" or "assign" in the relevant sense.

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As an initial matter, it is critical to understand the degree of separation that will exist between the SBC/Ameritech ILECs and the separate Advanced Services affiliate. Subject to certain transitional mechanisms and some exceptions discussed below, the affiliate will be operated in accordance with the structural, transactional, and non-discrimination requirements that would apply to a separate in-region interLATA affiliate's relationships with a BOC under 47 U.S.C. §§ 272(b), (c), (e), and (g), as interpreted by the Commission. Proposed Conditions for FCC Order Approving SBC/Ameritech Order ("Proposed Conditions") ¶ 3 (filed Sept. 7, 1999). Thus, the Advanced Services affiliate would have separate officers and directors and separate books of account. It would own its own Advanced Services equipment and would be responsible for all maintenance and repair and all network planning and engineering functions related to Advanced Services, as well as for circuit design functions related to each customer's Advanced Services sales order. In addition, the Advanced Services affiliate will be responsible for the assignment functions related to the Advanced Services equipment used to provision a customer's Advanced Services order; for creating and maintaining all records associated with the customer's Advanced Services account; and for ordering all interconnection facilities (e.g., unbundled local loops) and all telecommunications services (e.g., DSL special access service) from the incumbent LEC.

It is clear, then, that the Advanced Services affiliate will truly be a separate operation from the incumbent LEC and by no means a "successor" or "assign" of that LEC. This is true notwithstanding the fact that the Advanced Services affiliate will be permitted to interact with the incumbent LEC in certain ways specified in the conditions. For example, the Advanced Services affiliate will be permitted (1) to engage in joint marketing with the ILEC; (2) to use the ILEC's brand name without obligating the ILEC to make its brand name generally available; (3) to obtain billing and collection services from the ILEC; (4) to obtain operation, installation and maintenance ("OI&M") services from the ILEC on a nondiscriminatory basis; and (5) to receive from the ILEC facilities and equipment (e.g., DSLAMs and packet switches, but not conditioned loops) used to provide Advanced Services.

In our view, none of these factors, viewed singly or in combination, would render the Advanced Services affiliate a "successor" or "assign" of the ILEC. The first two (joint marketing and exclusive use of the brand name) are explicitly permitted by section 272, which sets out the requirements for a separate in-region interLATA affiliate. Since the 1996 Act clearly contemplates that a section 272 affiliate is not a "successor" or "assign" of the BOC,¹ joint

¹Otherwise, since section 272 forbids a BOC from providing in-region, interLATA services except through a separate affiliate, and section 153(4) defines "BOC" to include a "successor" or "assign," if the separate affiliate permitted by section 272 were itself a successor of

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marketing and use of the brand name, which are permitted by section 272, cannot render an Advanced Services affiliate a successor or assign.²

The third factor, billing and collection service provided by an SBC/Ameritech ILEC, would also be permitted under section 272, as long as it is offered on a nondiscriminatory basis. That is what the proposed conditions provide. In the event an SBC/Ameritech ILEC provides billing and collection service to the Advanced Services affiliate within a State, it "shall provide the same billing and collection services to unaffiliated providers of Advanced Services in that State on a nondiscriminatory [basis]." Proposed Conditions ¶ 3.b. The only permitted variation in treatment is that an ILEC can include its affiliate's bill on a separate page in the same envelope with its own bill. By contrast, the charges of the unaffiliated Advanced Services provider may be billed in a separate envelope from the charges of any SBC/Ameritech incumbent ILEC or affiliate. Even in that instance, however, "[t]he rates charged for providing billing and collection for unaffiliated providers in a separate envelope shall be no higher than the rates for providing billing and collection for the separate Advanced Services affiliate." Id.

As a practical matter, then, there is no discrimination in the treatment of affiliates and non-affiliates in billing and collection. Certainly, there is no "unjust or unreasonable" discrimination within the meaning of section 202(a) of the Communications Act. And, while even such a minor variation might run afoul of the "more stringent standard" of section 272(c)(1)

the BOC, section 272 would contain an internal contradiction.

²The proposed conditions also permit the affiliate and the incumbent ILEC to "provide customer care on behalf of the other." Proposed Conditions ¶ 3.a. "Customer care" is specifically defined to include the following functions performed after the sale: "on-going customer notification of service order progress, response to customer inquiries regarding the status of an order, changes to customer information, and receipt of customer complaints (other than receipt and isolation of trouble reports . . .)." Id. Since such limited functions are a natural, indeed inevitable, extension of customer care and joint marketing, they raise no additional problems. See First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended ("Non-Accounting Safeguards Order"), 11 FCC Rcd 21905, 22048, ¶ 296 (1996) (distinguishing between "activities such as customer inquiries, sales functions, and ordering, [that] appear to involve only the marketing and sale of a section 272 affiliate's services, as permitted by section 272(g)," and "[o]ther activities [that] appear to be beyond the scope of section 272(g), because they may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings").

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-- which the Commission has concluded requires absolute symmetry in treatment, Non-Accounting Safeguards Order, 11 FCC Rcd at 21998, ¶ 197, 22000-01, ¶ 202 -- that would not be sufficient to implicate the "successor" and "assign" concerns of section 251(h). As the Commission itself stressed in articulating the parameters of section 272(c)(1), sections 251 and 272 have "differing underlying purposes." Id. at 22001, ¶ 205. "The section 251 requirements are designed to ensure that incumbent LECs do not discriminate in opening their bottleneck facilities to competitors." Id. Billing and collections are not monopoly or in any sense bottleneck services, and precise symmetry in their provision is not required. ILECs provide the same billing and collection services to IXCs today. Certainly the inclusion of the bill of an Advanced Services affiliate on a separate page in the same envelope as the bill of an incumbent LEC would not be sufficient to render the affiliate, in any sense, a "successor" or "assign" of the ILEC. This is simply the provision of a service by one entity to another.

As for the fourth factor, although the Commission has interpreted the "operate independently" language of section 272 to preclude any provision of OI&M to a section 272 affiliate, no similar language is found in section 251(h), and there would be no apparent reason that the nondiscriminatory provision of OI&M, available to all CLECs on the same terms and conditions, would have any bearing on the question of whether an Advanced Services affiliate is a successor or assign. Again, this is simply the provision of a service by one entity to another.

That leaves the transfer of assets to the separate affiliate. Under 47 C.F.R. § 53.207, if a BOC transfers to an affiliated entity ownership of network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), that entity will be deemed an "assign" of the BOC for purposes of the definition of "Bell Operating Company" in section 153(4). It would arguably follow that such an entity would also be an assign of the ILEC for purposes of section 251(h)(1)(B)(ii). It would not follow, however, that the transfer of Advanced Services assets would turn an affiliate into an assign of the ILEC.

As an initial matter, the Commission has not determined that Advanced Services facilities are network elements that must be unbundled. Under current rules, therefore, the transfer of Advanced Services facilities does not make the recipient an "assign." Even if the Commission were to define Advanced Services facilities as UNEs, moreover, the Commission has recognized that such facilities are fundamentally different from the core network elements used to provide traditional telephone service. Thus, in its *Advanced Services Order*,³ the Commission drew a

³Memorandum Opinion and Order, and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, 13 FCC Rcd 24011 (1998).

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sharp distinction between "transfers of facilities used specifically to provide Advanced Services, such as DLAMs, packet switches, and transport facilities," and transfers of "other network elements, such as loops," which would automatically render a separate affiliate a successor of the ILEC. 13 FCC Rcd at 24061, ¶ 108.

Such a distinction finds support in the statute. Section 251(h) defines an ILEC as a carrier that "on February 8, 1996, provided *telephone exchange service*" and refers to "successor[s]" and "assign[s]" of such a carrier. 47 U.S.C. § 251(h) (emphasis added). Unlike the elements originally unbundled pursuant to Rule 319, the electronics and equipment used to provide Advanced Services are not core network elements used to provide telephone exchange service. Indeed, elements used to provide Advanced Services (except the conditioned loop) are entirely new facilities as opposed to the facilities that ILECs have long used to provide telephone exchange service. The ILECs have no monopoly in network elements used solely to provide Advanced Services. And, of course, the nature of the equipment used in the provision of Advanced Services does not change based on whether the Commission orders that equipment to be unbundled. For purposes of defining a "successor" or "assign," then, the Commission could continue to distinguish between those elements used to provide telephone exchange service and those used solely to provide Advanced Services, even if the Commission ultimately orders the latter to be unbundled.

In its *Advanced Services Order*, 13 FCC Rcd at 24061, ¶ 109, the Commission proposed a six-month grace period to allow the transfer of Advanced Services facilities (other than conditioned loops) to a separate facility. And, although the Commission there drew a tentative distinction between a *de minimis* transfer of such facilities and "a wholesale transfer," *id.* at 24060, ¶ 106, it is not clear that such a distinction would have any bearing on a transfer of Advanced Service facilities made by an ILEC today. Given the incipient nature of ILEC Advanced Services, any transfer of Advanced Services facilities will in fact be *de minimis* compared to the traditional local exchange facilities retained by the ILEC. (That is the relevant measure, since the core question is whether the affiliate has stepped into the shoes of the ILEC.) More fundamentally, the nature of these facilities — which are freely available to ILECs and CLECs alike in the open market — is fundamentally different from traditional, "bottleneck" local exchange facilities.

Such transfers are consistent with the Commission's policies as well. Under the current set of rules (where no separation is required), ILECs have begun purchasing Advanced Services facilities. If the Commission wishes to encourage ILECs to set up separate subsidiaries for Advanced Services (rather than incorporating such facilities into the public switched telephone network), it will be necessary to allow those facilities to be transferred, without carrying a

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crippling disability, to the new affiliate. CLECs will not be placed at any disadvantage, because such facilities are freely available for lease or purchase in the open market and the ILECs' facilities are very limited at this time.

As the Commission itself has noted, *id.* at 20460, ¶ 104 & n.202, there is no fixed test for when one entity will be considered a "successor" or "assign" of another. The terms are not defined in the 1996 Act, and prior case law in other contexts (e.g. labor law, corporate law, torts) has very little relevance because the inquiry is dependent upon the particular context and the purpose of the rules in question. Determinations about successorship, for example, must be based on "the facts of each case and the particular legal obligation which is at issue"; "there is and can be no single definition of 'successor' which is applicable in every legal context." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263 n.9 (1974).

Here, the "particular legal obligation which is at issue" is the obligation of an ILEC to open its network to new entrants so that they can compete with the ILEC in the provision of what have traditionally been monopoly local exchange services. The Commission believes that far from being impeded by the ILECs' transfer of its Advanced Services operations to an Advanced Services affiliate, this congressional purpose is promoted by placing Advanced Services offered by an ILEC on the same footing, with respect to access to the local exchange network, as those offered by a CLEC. Indeed, as a result of separating the ILEC's Advanced Services, the CLEC will have the added advantage of obtaining OI&M from the ILEC on the same terms and conditions as the ILEC affiliate. The whole point of the Commission's discussion of separate subsidiaries in its *Advanced Services Order* was to make that an attractive option for ILECs so that they would be encouraged to do it, with consequent benefits for ILECs and CLECs alike.

During the course of discussions about the proposed Advanced Services affiliate, three questions have been raised that are worth addressing briefly. First, we have been asked whether the "safe harbor" created by section 272 for joint marketing and exclusive use of the ILEC brand name should really apply in this context. Section 272, after all, only comes into play after a BOC has satisfied the market opening requirements of section 271. No such threshold requirement applies to ILEC provision of Advanced Services. But that point simply underscores the benefits of a separate affiliate in this context. An ILEC today can provide Advanced Services with no separation: obviously, then, joint marketing and exclusive use of the brand name, as well as provision of OI&M and use of ILEC assets, are all contemplated by the Commission for Advanced Services — all those things can be done right in the ILEC with no separation at all. There are no section 271 or other checklist requirements that must be met before an ILEC can provide Advanced Services. By shifting these operations to a separate affiliate, the ILEC should not lose the benefits of joint marketing and use of the brand name (otherwise it would have no

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incentive to make such a switch); but a CLEC gains the benefit of having transactions between the ILEC and the separate affiliate be open and available, so that the CLEC can benefit from similar transactions on a nondiscriminatory basis.

That is why the *Qwest* decisions — in which both the Commission and the D.C. Circuit held that certain sorts of joint marketing arrangements can constitute the “provision” of forbidden interLATA services — are inapplicable here. Those decisions focus exclusively on the issue of what interLATA-related services a BOC may provide today, prior to obtaining section 271 relief. They have no bearing on the separate question — governed by the terms of section 272 — of how the BOC may provide permitted services once section 271 relief is obtained. So too, here. There is no question that an ILEC can itself provide Advanced Services today. It is an entirely separate question whether the provision of such services through an Advanced Services affiliate implicates the “successor” and “assign” language in section 251(h). With respect to this latter question, the “safe harbor” in section 272 for joint marketing and use of the brand name is dispositive.

A second question concerned whether, even if each factor viewed separately would not render the affiliate a successor of the ILECs, the five taken together might do so. There is no reason to think that they would. As already noted, joint marketing, use of the brand name, and nondiscriminatory billing and collection are all permitted under section 272 and cannot, therefore, render the affiliate a successor taken separately or together. The provision of OI&M should have no bearing whatsoever on the question because OI&M must be provided on nondiscriminatory terms to CLECs and subsidiaries alike. Since there is no difference in treatment, OI&M services do not suggest that the affiliate has the special status of a successor. Finally, the transfer of assets that are not part of the ILEC’s traditional local exchange service should not make the affiliate a successor to obligations imposed on the ILEC when the ILEC continues to control the facilities used to provide traditional local exchange service.

Finally, we have been asked whether general case law dealing with the terms “successor” and “assign” has any bearing on this question. As already noted, the relevant inquiry is necessarily tied to the purposes of the particular legal obligation at issue. Accordingly cases drawn from other legal contexts have little relevance here and often diverge from one another in their approach. For example, in determining a “successor” for purposes of labor law, the Supreme Court focused on “whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.” *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (quotation marks omitted). The

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purpose of the inquiry, the Court stressed is to determine whether “those employees who have been retained will understandably view their job situations as essentially unaltered.” *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)). The goal is to “further the Act’s policy of industrial peace” and “[i]f the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.” *Id.* at 43-44.

In corporate and tort law, courts have also confronted the issue of whether a company is a “successor” or “assign” in determining whether it should be liable for another entity. In this context, however, the “well-settled” general rule is that “where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor.” *Conway v. White Trucks*, 885 F.2d 90, 93 (3d Cir. 1989). Indeed, courts have rejected liability even where the original and purchasing company share the same or similar names and the same company president. *See, e.g., PaceSetter*, 931 F. Supp. at 110 (refusing to find exception to general rule of liability where company name changed from PaceSetter to PaceSetter Marketing and the company president remained the same). Courts have also rejected liability where the purchasing company carries on the same business, manufactures the same product line under the same trade name, and profits from the goodwill, advertising and established market of its predecessor. *See, e.g., Burr v. South Bend Lathe, Inc.*, 480 N.E.2d 105, 108-09 (Ohio 1984).

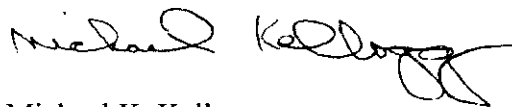
None of these cases, because of their different contexts, is dispositive, or even particularly informative, as to the meaning of “successor” and “assign” in section 251(h). The only case I am aware of that directly addresses the “successor” and “assign” language of section 251(h) is *MCI Telecommunications Corp. v. The Southern New England Telephone Company*, 27 F. Supp. 2d 326 (D. Conn. 1998), in which a district court upheld the Connecticut PUC’s approval of the transfer of SNET’s retail operations and customers to SNET America, Inc. (“SAI”). Even here, however, the court did not reach the question whether SAI should be considered a “successor” or “assign” of SNET. Instead, the Court determined that, regardless how that question was resolved, “being a ‘successor or assign’ of an ILEC, standing alone” is insufficient to subject a telecommunications carrier to resale obligations under sections 251 and 252. *Id.* at 336-37. The court concluded that, because SAI — as opposed to SNET — did not provide telephone exchange service in the State of Connecticut on February 8, 1996, it failed to satisfy the condition set forth in section 251(h)(1)(A), and therefore it could not be considered an ILEC. *Id.* at 337. Thus, according to the Court, it did not matter whether SAI is a “successor or assign” of SNET.

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The Commission must make its own *de novo* interpretation of the successor/assign language in section 251(h), in light of the purposes of the Act. For the reasons given in this letter, we believe that the correct result is that an Advanced Services affiliate, as described above, would not be a successor or assign of an ILEC. Certainly, *Chevron* deference would be sufficient to sustain a Commission determination to that effect.

I would be happy to discuss these matters further if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Kellogg", with a stylized flourish at the end.

Michael K. Kellogg